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ATTORNEY MALPRACTICE IN CALIFORNIA: A SHAKY CITADEL

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Amidst the ever increasing agitation for widespread protection of the consumer there stands a professional segment of our society apparently unable or unwilling to join in establishing acceptable safeguards for the rights of the consumers of their services. The legal profession continues to adhere to laissez-faire oriented concepts of professional responsibility which are inconsistent with prevalent concepts of fairness and social justice.

The lawyer who commits a malpractice in the representation of his clients or who engages in a misappropriation of funds is protected by a maze of ancient legal principles which make it virtually impossible for the injured client to be made whole or even for the lawyer to be reprimanded.

A plethora of legal and non-legal literature continues to inform us of the increasing obligation upon those who manufacture a "product" or purvey a service to deal with the public in a manner which emphasizes considerations of public safety, health and morals, as well as profit.[1]

Whether it be the manufacturer of drugs, the meat packer, the developer of a hair spray or the manufacturer of automobiles, no one will argue with the proposition that a product must not only do what it is intended to do but it must do it in a manner which will not cause secondary harm or unknown consequences to the user.

Not since the days of Upton Sinclair[2] and his "muckraking"

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1 *See, e.g.*, A. WHITE, ASSASSINATION OF THE CORVAIR (1969); R. NADER, UNSAFE AT ANY SPEED (1965); Prosser, *Strict Liability to the Consumer in California*, 18 HASTINGS L.J. 9 (1966); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

2 U. SINCLAIR, THE JUNGLE (1906).

colleagues has the public been so motivated and the legislative process so responsive to the demands of fair treatment, honest labeling and candid disclosure.

The law in all of its forms, as legislators, lawyers, and judges, has led this development by insisting through statute and case decision that those in a position to bear the responsibility for injury or harm caused by their product must do so. The extensions of the concepts of strict liability have effectively demolished the citadel, vitiated the once hallowed concept of caveat emptor and elevated the consumer into a position from which he can extract equal justice as against even the most economically powerful interests.

Beginning with *Greenman v. Yuba Power Products*[3] and extending through *Elmore v. American Motors Corporation*[4] the manufacturer has been forced to recognize his responsibility, not only to a consumer but to an innocent third party injured by the operation of his product.

In *Connor v. Great Western Savings & Loan Association*[5] and *Kriegler v. Eichler Homes*,[6] the land developer, home builder and those engaged in the construction of homes were required to recognize obligations to those who occupied the structures which they built when those individuals suffered injury and harm as a result of defects inherent in the initial design, installation and construction of the homes. Even the negligent "design" of a lot imposes responsibility upon an individual to those who are injured by the imperfection.[7]

These dramatic developments are best epitomized by the language of the *Kriegler* case:

> Law, as an instrument of justice, has infinite capacity for growth to meet changing needs and mores. Nowhere is this better illustrated than in the recent developments in the field of products liability. The law should be based on current concepts of what is right and just and the judiciary should be alert to the never-ending need for keeping legal principles abreast of the times. Ancient distinctions that make no sense in today's society and that tend to discredit the law should be readily rejected. . . .[8]

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[3] 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

[4] 70 A.C. 615, 451 P.2d 84, 75 Cal. Rptr. 652 (1969).

[5] 69 Cal. 2d 850, 447 P.2d 609, 73 Cal. Rptr. 369 (1968).

[6] 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969).

[7] Avner v. Longridge Estates, 272 A.C.A. 695, 77 Cal. Rptr. 633 (1969). *See Also*, Adelizzi, *Eichler and Avner—Strict Liability in Real Property*, 44 LOS ANGELES BAR BULL. 431 (1969).

[8] Kriegler v. Eichler Homes, 269 Cal. App. 2d 224, 227, 74 Cal. Rptr. 749, 752 (1969).

Perhaps the most striking evidence of the failure of the legal profession to include itself among those who must realize their responsibilities to the public is the manner in which the law has required the sister discipline of medicine to abandon its sacrosanct and immutable position. Its practitioners have been forced to enter the courtroom and be subjected to liberalized rules affecting the statute of limitations, burden of proof and necessity of expert testimony.

In recent years our courts have determined that the statute of limitations as against a physician may not even commence to run as long as a professional responsibility exists between the physician and the plaintiff.[9] The concept of res ipsa loquitur, so distasteful to the medical profession, was extended to its furthest limits by the supreme court, leaving virtually no area of medical skill incapable of being affected by this doctrine.[10] Even the most exotic of surgical procedures may now fall within the purview of this relaxed rule of evidence.[11]

The medical profession is not alone in feeling the brunt of the law's social responsibility proddings. Professions whose daily tasks closely resemble those of many lawyers find themselves without the protection of a narrow and rigid statute of limitations.[12]

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[9] Weinstock v. Eissler, 224 Cal. App. 2d 212, 36 Cal. Rptr. 537 (1964).

[10] Tomei v. Henning, 67 Cal. 2d 319, 431 P.2d 633, 62 Cal. Rptr. 9 (1967); Clark v. Gibbons, 66 Cal. 2d 399, 426 P.2d 525, 58 Cal. Rptr. 125 (1967); Quintal v. Laurel Grove Hospital, 62 Cal. 2d 154, 397 P.2d 161, 41 Cal. Rptr. 577 (1964).

[11] Belshaw v. Feinstein, 258 Cal. App. 2d 711, 65 Cal. Rptr. 788 (1968).

[12] Cook v. Redwood Empire Title Co., 275 A.C.A. 506, 79 Cal. Rptr. 888 (1969) [title company]; Moonie v. Lynch, 256 Cal. App. 2d 361, 64 Cal. Rptr. 55 (1967) [accountant]. A more complete listing is offered in *United States Liab. Ins. Co. v. Haidinger-Hayes, Inc.*, 1 Cal. 3d 586, 596, 463 P.2d 770, 776, 83 Cal. Rptr. 418, 424 (1970), wherein the Court states: "In . . . situations, such as those where a fiduciary obligation is involved the courts have recognized a postponement of the accrual until the beneficiary has knowledge or notice of the act constituting a breach of fidelity. This has been applied in actions against *trustees* (Cortelyou v. Imperial Land Co., 166 Cal. 14, 20 [134 P. 981]; *agents* (Twomey v. Mitchum, Jones & Templeton, Inc. (1968) 262 Cal. App. 2d 690 [69 Cal. Rptr. 222] (stockbroker); Amen v. Merced County Title Co. (1962) 58 Cal. 2d 528, 534 [25 Cal. Rptr. 65, 375 P.2d 33] (escrow agent); Walker v. Pacific Indem. Co. (1960) 183 Cal. App. 2d 513, 516-518 [6 Cal. Rptr. 924] (insurance agent); Allsopp v. Joshua Hendy Machine Works, 5 Cal. App. 228, 234 [90 P. 39] [disapproved on another issue in Jefferson v. J. E. French Co. (1960) 54 Cal. 2d 717, 720 [7 Cal. Rptr. 899, 355 P.2d 643]]); *accountants* (Moonie v. Lynch (1967) 256 Cal. App. 2d 361 [64 Cal. Rptr. 55]); and *physicians* (Huysman v. Kirsch (1936) 6 Cal. 2d 302 [57 P.2d 908]). The rule that the cause of action accrues when the negligent act occurs has been strictly applied in *attorney* malpractice situations (Chavez v. Carter (1967) 256 Cal. App. 2d 577, 581 [64 Cal. Rptr. 350]; Griffith v. Zavelaris (1963) 215 Cal. App. 2d 826 [30 Cal. Rptr. 517]; Bustamante v. Haet (1963) 222 Cal. App. 2d 413, 414-415 [35 Cal. Rptr. 176]) unless the continuing nature of the attorney's conduct, and the continuing reliance of the beneficiary upon his faithful performance, prevent the discovery of negligence until after it has become irremediable (Hayer v. Flaig (1969) 70 Cal. 2d 223, 229, 322 [74 Cal. Rptr. 225, 449 P.2d 161])."

Only the lawyer remains singularly protected by the very same weapon that he has used so effectively against all other segments of society. The law which has broadened the rights of the general public remains the vehicle by which the legal profession preserves itself from similar treatment.

A review of the California law of attorney malpractice is a revealing demonstration of the protective labyrinth the legal profession has constructed.

THE PRESENT STATE OF THE LAW OF ATTORNEY MALPRACTICE IN CALIFORNIA

The Statute of Limitations

California statutory law does not contain a section specifying the statute of limitations for attorney malpractice. The case law[13] is clear, however, that the two-year limitations period of section 339(1) of the Code of Civil Procedure[14] is the applicable period of limitations. Where the services are rendered by an attorney pursuant to either a written contingent fee agreement, or any other written agreement, the four-year period of limitations provided for in Code of Civil Procedure section 337(1)[15] applies.[16]

The real stumbling block for the injured client is the judge-made rule that the limitations period runs from the time of the negligent act and not from the time of its discovery.[17] As is well known, California has long held that the cause of action for medical malpractice does not accrue until the discovery of the negligence.[18] The "discovery rule" was also recently applied in an action against an accountant for malpractice.[19] A comparison of the rule applicable to doctors and accountants with that for attorneys quickly exposes

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[13] Alter v. Michael, 64 Cal. 2d 480, 413 P.2d 153, 50 Cal. Rptr. 553 (1966); Yandell v. Baker, 258 Cal. App. 2d 308, 65 Cal. Rptr. 606 (1968).

[14] CAL. CODE CIV. PROC. § 339(1) (West 1954). "Within two years: 1. An action upon a contract, obligation or liability not founded upon an instrument of writing . . . ."

[15] *Id.* § 337(1). "Within four years: 1. An action upon any contract, obligation or liability founded upon an instrument in writing . . . ."

[16] Benard v. Walkup, 272 A.C.A. 683, 77 Cal. Rptr. 544 (1969); Stone v. Carpenter, 211 Cal. App. 2d 491, 27 Cal. Rptr. 203 (1963).

[17] Lattin v. Gillette, 95 Cal. 317, 30 P. 545 (1892); Bustamante v. Haet, 222 Cal. App. 2d 413, 35 Cal. Rptr. 176 (1963).

[18] Huysman v. Kirsch, 6 Cal. 2d 302, 57 P.2d 908 (1936). The medical malpractice rule was formerly the same as that for legal malpractice. Gum v. Allen, 119 Cal. App. 293, 6 P.2d 311 (1931).

[19] Moonie v. Lynch, 256 Cal. App. 2d 361, 64 Cal. Rptr. 55 (1967). For a similar ruling against a title company, *see* Cook v. Redwood Empire Title Co., 275 A.C.A. 506, 79 Cal. Rptr. 888 (1969).

the narrow, parochial and protective nature of the latter. Old adages such as "we take care of our own" spring readily to mind. As would be expected, legal commentators have severely criticized this obvious paternalism.[20]

The critics of this harsh rule are no longer peculiar to the groves of academe. In *Yandell v. Baker*[21] the court, while applying the general rule, criticized its harshness by stating:

> In most cases, as in this, by the time he reasonably could discover the effect of the attorney's advice, the statute has run, precluding the client from any redress because of the attorney's negligence. However, the rule has been established, and we are required to follow the rule. It can only be changed by the Supreme Court or the Legislature.[22]

Thus, the gauntlet was thrown down.[23]

In *Heyer v. Flaig*[24] the Supreme Court accepted the challenge in part. There, intended beneficiaries sought to recover losses that resulted to them because the defendant-attorney negligently failed to fulfill the client's testamentary directions. The defendant argued that the suit was barred since the testatrix would have been barred by the statute of limitations had she lived and brought an action on the date of the plaintiff's suit. The court rejected this argument and held that if there is a continuing duty on the part of the attorney,

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[20] *See, e.g.*, Comment, *Statutes of Limitations in Legal Malpractice*, 18 CLEV.-MAR. L. REV. 82 (1969); Note, *The Commencement of the Statute of Limitations in Legal Malpractice Actions—The Need for Re-evaluation*, 15 U.C.L.A. L. REV. 230 (1967).

[21] 258 Cal. App. 2d 308, 65 Cal. Rptr. 606 (1968). The facts of the *Yandell* case are indicative of the harshness of the rule: In January, 1962, the plaintiffs consulted the defendant attorney regarding a tax program involving the dissolution of the plaintiffs' corporation and the distribution and transfer of the corporation's assets. The certificate of "Winding Up the Dissolution" of the corporation was filed with the Secretary of State June 11, 1962, and with the Alameda County Clerk June 14, 1962. In July of 1963 the Internal Revenue Service notified the plaintiffs that it rejected the plaintiffs' version of the tax program. On December 11, 1963, the Service notified the plaintiffs that they were required to make an additional tax payment of $32,000. The plaintiffs on December 10, 1964, filed an action for malpractice against all defendants (the attorney and a certified public accounting firm) claiming damages in the sum of $32,000 and an additional sum of $80,000 which it was alleged they would sustain because of additional taxes. The plaintiffs appealed a motion sustaining the defendants' demurrer on the basis of the statute of limitations. The appellate court held that the statute of limitations began to run at the time the plaintiffs changed their position in reliance on the attorney's negligent advice, and not at the time they were informed of the amount owing by the Internal Revenue Service.

[22] *Id.* at 316, 65 Cal. Rptr. at 611.

[23] *Id.* at 316 n.3, 65 Cal. Rptr. at 611 n.3. The Court amplified its dissatisfaction with the rule with the following language: "In fraud cases, medical malpractice cases, and we have recently held in accountant's malpractice cases, the statute does not start to run until the injured party receives, or with reasonable diligence could have received, notice of the injury. *There does not appear to be any good reason why a similar rule should not apply in attorney's malpractice cases.*" (Emphasis added.)

[24] 70 A.C. 232, 449 P.2d 161, 74 Cal. Rptr. 225 (1969).

after an original act of negligence, and the opportunity to correct said negligence is available, yet the attorney does not correct the situation, then the statute of limitations will not commence until the original negligence becomes irremediable. The rights of the beneficiaries thus may sometimes rise higher than those of the testator based on the independent nature of the duty of care which accrues directly in favor of the beneficiaries.

When closely read the *Heyer* decision portends that the rule of accrual of the limitations period in legal malpractice may be short-lived. Footnote seven of the decision indicates that the rule is not clothed with reason:

> [T]he very theories which led to the rule in medical malpractice cases that the statute runs only from the date of discovery of the negligence could be applied in the instant situation. . . . The judicial rule against postponed accrual of the statute of limitations in legal malpractice actions rests upon a tenuous basis.[25]

For the sake of beleaguered clients it can only be hoped that this language will be prophetic. Presented with the right case, the court seemingly would give this widely discredited rule its comeuppance.[26] Until that time, as each day passes undetected attorney defalcations and misconduct reach or approach protective insulation from the aggrieved client.

The Rise And Fall Of Privity Of Contract

In *Buckley v. Gray*,[27] the California Supreme Court adopted the traditional limitation of insisting on privity of contract before a plaintiff could maintain an action against an attorney. Thus, the court held that an attorney who negligently drafted a will was not liable to a person named in the will who was deprived of benefits as a result of the error. It was also reasoned that there could be no recovery on a third party beneficiary theory since the contract was not expressly for the plantiff's benefit[28]—thus he was an incidental beneficiary.

The stringent privity test was later rejected in *Biakanja v. Irving*.[29] There, a notary public who prepared a will[30] negligently failed to direct proper attestation. The supreme court held that the

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[25] *Id.* at 242-43 n.7, 449 P.2d at 168 n.7, 74 Cal. Rptr. at 232 n. 7.

[26] *Cf.* CAL. CIV. CODE § 3510 (West 1954): "When the reason of a rule ceases, so should the rule itself."

[27] 110 Cal. 339, 42 P. 900 (1895).

[28] *Id.* at 342-43, 42 P. at 900.

[29] 49 Cal. 2d 647, 320 P.2d 16 (1958).

[30] *Id.* Although unauthorized to practice law.

defendant was liable in tort to an intended beneficiary who was damaged because of the resulting invalidity. To replace the privity rule a balancing test was added. Whether a defendant will be held liable to a person not in privity requires consideration and balancing of various factors, including:

1. To what degree the transaction was intended to affect the plaintiff;
2. The foreseeability of harm to him;
3. The degree of certainty of plaintiff's injury;
4. The causal relationship between the defendant's conduct and the injury; and,
5. The policy of preventing future harm.[31]

In 1961 the California Supreme Court in *Lucas v. Hamm*[32] held that lack of privity between the plaintiff and the attorney would no longer bar an action against the attorney for negligence. The effect of the *Lucas* decision was best summarized as a showing that "[t]he citadel of privity is collapsing and that some of it is tumbling about the ears of the lawyers."[33]

The court in *Lucas* was naturally concerned whether elimination of the privity requirement in this type of case would place too great a burden on the members of the legal profession. The court answered in the negative:

> We are of the view that the extension of his liability to beneficiaries injured by a negligently drawn will does not place an undue burden on the profession, particularly when we take into consideration that a contrary conclusion would cause the innocent beneficiary to bear the loss.[34]

In the recent case of *Heyer v. Flaig*,[35] the California Supreme

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[31] *Id.* at 650, 320 P.2d at 19.

[32] 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), *cert. denied*, 368 U.S. 987 (1962). The defendant-attorney, in violation of instructions and in breach of contract, negligently prepared testamentary instruments and ran afoul of the rule against perpetuities. Plaintiffs, as intended beneficiaries, were thereby forced to settle their share of the estate at a loss of $75,000 from the sum they would have received had the defendant drafted in accordance with the testator's directions.

[33] Meehan, *Careless Lawyers and Careworn Third Parties*, 28 BROOKLYN L. REV. 99 (1961). Many legal commentaries followed the Lucas decision. *See, e.g.*, Note, 14 STAN. L. REV. 580 (1962); Note, 40 TEX. L. REV. 1046 (1962); Note, 64 W. VA. L. REV. 361 (1962).

[34] Lucas v. Hamm, 56 Cal. 2d 583, 589, 364 P.2d 685, 688, 15 Cal. Rptr. 821, 824 (1961).

[35] 70 A.C. 232, 449 P.2d 161, 74 Cal. Rptr. 225 (1969). Here again the case involved an attorney who failed to fulfill the testamentary directions of his client.

Court reiterated its *Biakanja-Lucas* rationale. The balancing test of *Biakanja* was again stressed by the court.[36]

It is beyond cavil that the effect of *Biakanja* and *Lucas* will be material; "They could very easily become as well known to attorneys who handle similar cases as *MacPherson v. Buick* is to attorneys handling cases concerning product liability. . . ."[37]

Attorney's Negligence—From Question of Law to Question of Fact

California long adhered to the minority view that the question of whether there had been malpractice by an attorney was a question of law. *Gambert v. Hart*[38] first considered the problem and ruled as follows:

> In actions of this character against attorneys, the rule is well settled that when the facts are ascertained the question of negligence or want of skill is a question of law for the Court.[39]

With obvious misgivings, the Court of Appeal in *Floro v. Lawton*[40] reviewed the *Gambert* case but did not decide the question. Finally, *Ishmael v. Millington*[41] put the rule of the *Gambert* case to rest with the following language:

> Breach of duty is usually a fact issue for the jury; if the circumstances permit a reasonable doubt whether the defendant's conduct violates the boundaries of ordinary care, the doubt must be resolved as an issue of fact by the jury rather than of law by the court.[42]

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[36] The real import of the *Heyer* decision is its effect on the statute of limitations.

[37] Averill, *Attorney's Liability to Third Persons for Negligent Malpractice*, 2 LAND & WATER L. REV. 379, 396 (1967).

[38] 44 Cal. 542 (1872).

[39] *Id.* at 552.

[40] 187 Cal. App. 2d 657, 675, 10 Cal. Rptr. 98, 109 (1960), wherein the Court states, ". . . a review of the authorities leads us to the conclusion that if the *Gambert* case is the law in this state, then we hold to the minority view."

[41] 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966). However, it has been effectively stated that there still may be a judicial reluctance to submit the issue to the jury; *see* Comment, *Attorney Malpractice*, 63 COL. L. REV. 1292, 1306 (1963). "Allocating responsibility between judge and jury in attorney malpractice suits raises questions even more delicate and complex than those presented in ordinary negligence cases, which normally involve mixed questions of law and fact. The nature of the relationship between bench and bar inevitably influences judicial attitudes. It is not entirely unrealistic to suppose that some judges may be influenced by their sympathy for fellow attorneys; other judges who feel strongly about improving the legal profession may treat an erring attorney with excessive harshness. Moreover, since judges are constantly exposed to a wide range of legal issues, they may believe that they are uniquely qualified to evaluate the difficulty of the problem that faced the defendant attorney."

[42] Ishmael v. Millington, 241 Cal. App. 2d 520, 525, 50 Cal. Rptr. 592, 595 (1966).

This needed metamorphosis of law to fact took well over three-quarters of a century, to the consternation of clients caught in the transition.

Prohibition of Expert Testimony

In most jurisdictions, expert evidence as to the standards of practice and negligence is admissible in malpractice actions against attorneys.[43] Again, California adhered to a minority view. Since the question of attorney malpractice in California was long viewed as a question of law,[44] not fact, it was thus also held that the testimony of an expert was inadmissible.

As noted earlier,[45] the legal malpractice suit is now viewed as but one variety of negligence and is therefore governed by the general doctrines (*i.e.*, question of fact) prevailing in negligence actions.[46] Seemingly, (and logically), the admissibility of expert testimony will follow suit. The recent case of *Lysick v. Walcom*[47] perhaps demonstrates the future course of the law in this area. There, two attorneys testified at the trial as to the relevant standard of care. The court of appeal, while not discussing the propriety of the use of the expert testimony, held that such expert evidence is conclusive as to the prevailing standard of skill and learning in the locality as well as the propriety of the defendant's conduct. The court's rationale is both probative and instructive:

> This rule has been applied in California to medical malpractice cases, and while no cases have been found in this state applying the rule to legal malpractice, there is no reason why the rules of evidence for malpractice against a lawyer should not be the same as those governing cases against doctors. It has been so held in other jurisdictions. Accordingly, when the matter in issue is within the knowledge of experts only and not within the common knowledge of laymen, expert evidence is conclusive and cannot be disregarded.[48]

It would be overly optimistic to think that the difficulty in obtaining expert testimony will be less prevalent among attorneys[49]

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[43] Wade, *The Attorney's Liability for Negligence*, 12 VAND. L. REV. 755 (1959); Annot., 17 A.L.R.3d 1442 (1968).

[44] Gambert v. Hart, 44 Cal. 542 (1872).

[45] *See* text at note 42 *supra*.

[46] Ishmael v. Millington, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966).

[47] 258 Cal. App. 2d 136, 65 Cal. Rptr. 406 (1968).

[48] *Id.* at 156, 65 Cal. Rptr. at 419.

[49] Floro v. Lawton, 187 Cal. App. 2d 657, 675, 10 Cal. Rptr. 98, 109 (1960) (dictum). *See also* Comment, 26 TENN. L. REV. 525, 527 (1959); Note, 70 YALE L. J. 978 n.1 (1961).

than it is among physicians.[50] When the "conspiracy of silence" is coupled with the client's problem of finding a lawyer who is willing to sue his brethren, it can only be concluded that litigation in this area will be an inadequate and speculative remedy.

NEXT STOP: RES IPSA LOQUITUR

It is easily recognizable that there will be many circumstances in which a client might be unable to pinpoint the exact act of professional neglect which led to his untoward result.[51] The mere mention of the Rule Against Perpetuities will suffice as one example of the many inherent complexities of legal matters.[52] The plaintiff's task of proving attorney malpractice will be complicated by the reluctance of attorneys to testify against their fellow attorneys. These same obstacles confront the injured plaintiff seeking to prove negligence on the part of the doctor. However, the doctrine of res ipsa loquitur has proven to be an effective "instrument" in aiding the plaintiff to overcome the obstacles in proving medical malpractice.[53]

California decisional law on attorney malpractice is singularly devoid of any discussion of the applicability of res ipsa loquitur. Elsewhere there is limited (and well aged) authority holding the doctrine to be inapplicable.[54] Yet, there remains a striking similarity in the litigation problems facing the injured patient and the careworn client. The similar sounding pleas of the patient and client fall upon the same ears: those of the bench and bar. While they listened and acted in the case of medical malpractice, a combination of auditory and ataxic aphasia sets in when the client's problems with his lawyer are the subject. This protective malady and the other contrived distinctions between medical and attorney malpractice are at best opprobrious, as well as potentially damaging to the public's confidence in the legal profession. As one legal commentator has noted:

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50 Huffman v. Lindquist, 37 Cal. 2d 465, 483, 234 P.2d 34, 45 (1951) (dissenting opinion): "It is a matter of common knowledge that members of any county medical society are extremely loath to testify *against* any other member in a malpractice case." Further judicial recognition of the "conspiracy of silence" is found in *Salgo v. Leland Stanford Univ.*, 154 Cal. App. 2d 560, 568, 317 P.2d 170, 175 (1957). *See also* Belli, *An Ancient Therapy Still Applied: The Silent Medical Treatment*, 1 VILL. L. REV. 250 (1956).

51 This again points out the harshness of the judicial rule against postponed accrual of the statute of limitations in legal malpractice actions.

52 "There is something in the subject which seems to facilitate error." GRAY, THE RULE AGAINST PERPETUITIES xi (4th ed. 1942). *See also* Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), *cert. denied*, 368 U.S. 987 (1962).

53 Note, 18 HASTINGS L.J. 691 (1967).

54 Olsen v. North, 276 Ill. App. 457 (1934).

> Because erosion of public confidence in the legal profession would inevitably undermine respect for the entire legal system, it is particularly important that the public not have basis for believing that attorneys are afforded special treatment that effectively insulates them from liability.[55]

RECOMMENDED ALTERNATIVES

If we as a profession are prepared to accept the responsibilities demanded by this New Society, the method by which we implement the procedures for an effective resolution of disputes between clients and their attorneys should be our foremost consideration. It is a time for innovative ventures.

The alternatives are clear. We can commence down the road followed by the medical profession and eventually find ourselves governed on a case by case basis until we arrive at the same inexorable end point as has that profession. It will be possible for litigation to wend its way through the appellate courts and with the inevitable passage of time, find that res ipsa loquitur does apply, that the statute of limitations does not begin to commence while the professional relationship exists, and that the doctrine of informed consent is applicable to lawyers, to name but a few of the ramifications that have progressively lightened the burden of those seeking to institute claims against the medical profession.

That procedure is admittedly arduous and time-consuming. More important, it means that an untold number of litigants must be the reluctant vehicle by which this path is worn.

The mere prospect of venturing down the same laborious road as was traveled in determining the posture of medical malpractice litigations should be enough to discourage us. An alternative system can be made to function assuming the good faith desire of the legal profession to make it work.

There are two separate but related problems that must be dealt with.

A Clients' Security Fund

First, the client whose funds have been misappropriated must be reimbursed. The procedure for reimbursement need not be a complex one and there is precedent for its adoption. The client security fund is neither a new nor a novel concept in the legal profession.[56]

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[55] Comment, *Attorney Malpractice*, 63 COLUM. L. REV. 1292, 1312 (1963).

[56] New Zealand first originated a clients' security fund in 1929. Presently, there

Basically the purpose of the fund is to make the aggrieved client whole. Payment is made solely to reimburse persons who have had funds embezzled or misappropriated by their attorneys and does not cover clients' claims arising over fees or other items falling generally within the term "legal malpractice." Ideally, the fund is financed through an allocated percentage of each attorneys' State Bar Association dues.[57] The clients' security fund is not meant to serve either as a substitute for professional discipline or as malpractice insurance. It is, however, "the only financial salvation for the client who has suffered a loss through the lawyer's defalcation, other than a recovery from the lawyer himself, and he may be insolvent, bankrupt or unavailable to citation."[58]

On a national level the advocates for such funds are numerous.[59] The fund has also been the subject of discussion within our own State Bar in past years.[60] For reasons probably more attributable to inertia than to decision making, no definite step leading to the development of a state wide client security fund has been undertaken by the California State Bar. That such a development is long overdue has been recognized by at least one of our appellate courts:

> We think it urgent that the State Bar not only institute a client security fund but also put in effect stronger measures than presently exist for the protection of clients' money in the hands of attorneys, a combination of measures which would do more to improve the respect of the general public for attorneys than all the press agentry and public relations programs of the past decade.[61]

The primary argument lodged against the fund is that the profession as a whole bears no moral guilt or owes no pecuniary responsibility for the unfortunate client selecting a lawyer who does not live up to the standards of the profession.[62] The limitations of this argument have been effectively pointed out by others.[63] Indeed

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are thirty-one active state bar association clients' security funds. There are also local funds in metropolitan areas, such as Philadelphia, Los Angeles, Baltimore and New York. *See generally* Note, *The Disenchanted Client v. The Dishonest Lawyer: Where Does the Legal Profession Stand?*, 42 NOTRE DAME LAW. 382 (1967); Bryan, *Clients' Security Fund Ten Years Later*, 55 A.B.A.J. 757 (1969).

[57] Various insurance or indemnity plans have been proposed for clients' security funds. Thus far, probably due to insufficient actuarial information, no American insurance company has offered either primary or excess coverage.

[58] Bryan, *supra* note 56.

[59] Smith, *The Client's Security Fund: A Debt of Honor Owed by the Profession*, 44 A.B.A.J. 125 (1958); Voorhees, *The Case for the Clients' Security Fund*, 42 J. AM. JUD. SOC'Y 155 (1959). *See also* authorities cited in note 56, *supra*.

[60] Sterling, *A Clients' Security Fund*, 34 J. ST. B. CAL. 243 (1959).

[61] Blackmon v. Hale, 78 Cal. Rptr. 569, 582 (1969), *vacated*, 1 Cal. 3d 548 (1970).

[62] Sterling, *supra* note 60.

[63] *See* Note, *The Disenchanted Client v. The Dishonest Lawyer: Where Does the Legal Profession Stand?*, 42 NOTRE DAME LAW. 382 (1967).

it is difficult to even develop a cogent argument against the creation of such a fund if the primary consideration is the responsibility of the legal profession to the public rather than some narrow concept of pecuniary gain or loss to the individual attorney.[64]

As a corollary to the public good generated by a client security fund, the profession will also benefit from a public relations standpoint. It is easily recognized that "[t]he public looks to the profession to keep its own house in order and when a lawyer embezzles his clients' funds, the whole bar is blackened in the public eye."[65] The immeasurable harm done to the whole profession by an unscrupulous attorney can be effectively countered when the public is made aware of the bar's preeminent dedication to the aggrieved client. The clients' security fund would be a clear manifestation of that dedication.

Impartial Legal Panels

The second and distinct area of professional responsibility which must be recognized is the proper handling of attorney malpractice claims. The difficult questions involved in determining the standard of care that should have been employed by a professional person in the handling of a particular problem has plagued all specialties. Our own circumstance is unique in that we are already equipped to establish the forums and provide expert judges to pass on this issue.

It is initially essential that the courts or the legislature eliminate the arbitrary and formalistic statutes of limitation rules which presently exist. A rule of "discovery" analogous if not identical to that imposed upon the medical profession is inherent in the fiduciary relationship which we recognize to each of our clients.[66] But beyond this the mechanism by which an attorney's conduct will be effectively and impartially judged can be readily assembled through the cooperation of the practicing bar and within the structure of the organization of the State Bar.

A system can be developed by which a client who believes he

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[64] R. POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES, at 5 (1953): "Pursuit of the learned art in the spirit of a public service is the primary purpose [of a profession]. Gaining a livelihood is incidental, whereas in a business or trade it is the entire purpose."

[65] ABA Special Committee on Clients' Security Fund Rep. 3 (Feb., 1959). *See also* Sterling, *supra* note 60.

[66] Cox v. Delmas, 99 Cal. 104, 123 (1893), "[A] fiduciary relation of the very highest character . . . [which] . . . binds the attorney to most conscientious fidelity—*umberrima fides.*" *See also* Rader v. Thrasher, 57 Cal. 2d 244, 368 P.2d 360, 18 Cal. Rptr. 736 (1962).

has received professional care below the standard expected to be exercised by a competent attorney may apply to the State Bar through a formal complaint procedure to be established by them.

A. The complaint (a comprehensive statement of facts) would be reviewed by an attorney employed by the State Bar in order to determine whether or not facts existed sufficient to warrant further inquiry.[67]

B. If the State Bar attorney believes that facts exist which are sufficient to warrant further investigation, the attorney involved should then be notified so that he can in turn prepare his own statement of facts in response.

C. If the State Bar attorney believes that the factual or legal issues presented warrant further inquiry a panel should be appointed consisting of three attorneys who would then review the evidence involved, take testimony if necessary, and render a decision. The panel should be drawn from attorneys who practice in a geographic area removed from that of the attorney charged with the alleged act of professional neglect. This is a particularly important qualification in order that the same degree of effectiveness will exist in a small or medium-sized community as would exist in a major metropolitan area. It is imperative that any possibility of the appearance of a "club or fraternity" atmosphere be eliminated by determining in advance that the attorneys selected as the panel members have no connection with the lawyer under investigation.

D. In the event that the panel determines that no deviation from the standard of care has occurred, the client would, of course, be entitled to utilize his common law rights to seek counsel and proceed with a civil action that would then be defended by the professional malpractice liability carrier of the attorney involved.

E. If the panel were to determine that a deviation from the standard of care had occurred in the representation of the client, then the senior member of the panel (designated by the State Bar) voting in that manner would be obligated to render a written report and to testify on behalf of the client in the event of civil litigation.[68]

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[67] This is essentially the same system in operation at the present time relating to State Bar disciplinary matters.

[68] This would serve to alleviate the careworn client's problems in securing expert testimony.

F. The proceedings of the panel would be confidential so that the remaining panel members would be immune from subpoena and prohibited from disclosing their views concerning the facts presented to them regardless of whether they concurred or differed.

Upon notification to the parties of the panel's decision that the attorney had engaged in conduct which did not meet the prevailing standard of performance, it is to be expected that he would immediately advise his professional malpractice liability carrier. It also seems a reasonable assumption that that insurance carrier, faced with the finding of the panel, would give serious consideration to the settlement of this dispute without the necessity of incurring litigation expenses.

An analogous procedure exists in the medical malpractice area with the institution of medical-legal panels in several medical associations. Ideally, these panels provide objective doctors who examine a claimed malpractice case and if it is malpractice, furnish expert testimony. However, the analogy to the performance of the medical-legal panels is not totally satisfactory. While it is true that in many instances a finding of medical malpractice by a panel doctor will produce the settlement of the case without trial, a finding in favor of the physician seldom convinces a patient's attorney of the weakness of his case. The lawyer's inherent reluctance to accept the judgment of one physician upon the conduct of another limits the effectiveness of these panels.

Obviously, the suggested panel system for the determination of disputes involving lawyers does not carry with it this inherent prejudice. The subject matter under consideration by the panel is a subject matter with which they are competent to deal and which the lawyers representing the attorney involved can fully understand. So long as there is confidence in the integrity and impartiality of the panel itself (by both attorney and client) experience would indicate that attorneys representing malpractice insurance carriers[69] would be heavily influenced by a decision of a lawyer member of the panel adverse to them.

The subject of what damages would be necessary to compensate the client for an attorney's misconduct would probably not come within the purview of such a panel unless the loss had to be

[69] It well may be that in the future all attorneys will be required to be covered by malpractice insurance as a prerequisite to membership in the integrated state bar. It is the authors' understanding that the State Bar has been trying to obtain statewide malpractice insurance but has as yet been unable to put together a conglomerate of insurance companies willing to undertake the risk.

fixed within a specific period of time or related to certain other liquidated accounts.

The problem of assessing damages in attorney malpractice is not comparable to that of assessing damages for injury resultant from an act of medical malpractice. While there may be considerations of emotional distress involved in lawyer conduct it is unlikely that the elements of damage resulting from an attorney's misconduct will be as vague as "pain and suffering." In any event, experienced trial lawyers will quickly acknowledge that if the issue of liability is determined the subject of damages is most often capable of resolution.

The suggested mechanics of this procedure can undoubtedly be subjected to improvement and modification, but if we recognize that some procedure for the resolution of attorney-client disputes must exist it will not be difficult to arrive at a plan which will serve the interests of the public. A method of protecting the public without the necessity of subjecting it to the harassment and uncertainties that presently prevail in actions against other professional groups is paramount. The concept of requiring members of a profession to institute litigation against members of the same profession is inherently designed to encourage suspicion on the part of the client and distrust on the part of the public. The creation of impartial legal panels will serve to assuage the public's skepticism.

CONCLUSION

The State Bar, as an integrated bar created by statute,[70] is quasi-public and its responsibility to the public should be even greater than the fiduciary responsibility normally imposed upon it by virtue of the attorney-client relationship. This obligation, as well as the prevailing social tendencies of the times, is sufficient to require that we arrive at a program of efficient administration of professional liability claims that will allow redress to the individual without undue harassment to the attorney. This responsibility, while great, is not difficult to meet. The legal profession is an honorable profession increasingly skilled and highly motivated by fundamental concepts of social obligation. Those members of the profession who engage in conduct that is morally or legally reprehensible constitute an infinitesimal fraction of the bar. There can be no question but that we have a responsibility to protect the public from them.

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70 Cal. Stats. 1927, ch. 34, § 1, at 38 (1927), *as amended* Cal. Stats. 1939, ch. 34, § 1, at 347 (1939) (Codified at CAL. BUS. & PROF. CODE §§ 6000-6154 (West 1962)).

By creating a clients' security fund and an impartial professional mechanism for the handling of claims against attorneys substantial progress will be made in elevating the reputation of our profession among the public, as well as fulfilling more completely our responsibility to them.

It is axiomatic that we live in a rapidly changing society which increasingly demands that the efficient administration of justice maintain as its primary consideration an ultimate concept of Fairness. To a profession long bound by a tradition of rigid language, technicalities, and formalistic procedure, this swiftly moving current of popular demand may seem alien and incompatible, but it is the inherent strength of the Law that it has a never ending capacity to adapt itself to the demands of the times in which it must be applied.[71] This obligation to make the law relevant and meaningful to the individual citizen must be a paramount obligation when we are concerned with the efficient adjudication of our own profession's obligation[72] to the public.

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[71] *See* text at note 8 *supra*.

[72] The law has defined the public obligation of other professions in terms of the law's admonitory policy—that is, in both preventive and punitive terms. *See* Connor v. Great Western Sav. & Loan Ass'n, 69 Cal. 2d 850, 447 P.2d 609, 73 Cal. Rptr. 369 (1968).